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10 Orig.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910.

IN THE MATTER OF THE MERCHANTS' STOCK AND GRAIN COMPANY, FRANK J. MINER AND PATRICK A. STEPHENS PETITIONERS FOR WRIT OF MANDAMUS.

APPLICATION FOR LEAVE TO FILE PETITION.

CHESTER H. KRUM,
HENRY S. PRIEST,
For Petitioners.

St. Louis Law Printing Co., Printers' Building, 9th & Walnut. Main 1919.

IN THE

Supreme Court of the United States.

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IN THE MATTER OF THE MERCHANTS' STOCK AND GRAIN COMPANY, FRANK J. MINER AND PATRICK A. STEPHENS PETITIONERS FOR WRIT OF MANDAMUS.

APPLICATION FOR LEAVE TO FILE PETITION.

The **Merchants Stock and Grain Company**, a corporation, **Frank J. Miner** and **Patrick A. Stephens** now come and respectfully move the Court to grant them leave to file the accompanying petition for a writ of mandamus against Honorable Walter H. Sanborn, Elmer B. Adams and Thomas C. Munger, Judges of the United States of Appeals for the Eighth Judicial Cir-

cuit, and against the said court or such Judges as may, at the time, constitute the court, requiring them to entertain jurisdiction of a certain writ of error in said petition fully described, and as grounds of this application, they respectfully show, that

The said Judges above named, then constituting or holding said court, on the twenty-ninth day of April, 1911, at a regular term or session of said court, dismissed and refused to entertain jurisdiction of a writ of error prosecuted by these petitioners to the Circuit Court of the United States for the Eastern Division, Eastern District of Missouri, from a certain judgment in contempt set out in said petition;

That in dismissing said writ and refusing to entertain jurisdiction thereof, said Judges disregarded the express ruling of this Court in **the matter of the petition of the Christensen Company**, 194 U. S. 458-48, L. Ed. 1072.

That the writ so dismissed was and is a writ allowed and issued in the prosecution of a specific criminal offense and one of which the said United States Circuit Court of Appeals has jurisdiction under the laws of the United States, that is to say a writ of error allowed by the Circuit Court of the United States for the Eastern Division, Eastern District of Missouri, from a judgment of fines imposed for an alleged violation of a preliminary order of injunction entered in a proceeding in equity, in which said judgment the said fines were apportioned and directed to be paid three-fourths to the complainant and one-fourth to the United States and in default of such payment the individual defendants were ordered to be committed until such fine should be paid, and the ground of the refusal of said United States Court of Appeals to entertain jurisdiction of said writ of error so dismissed, being that the proceeding was merely civil and not criminal in character, that the part of the fine apportioned to the United States did not dominate the proceeding, and that the action of the lower

court was reviewable only upon appeal after final decree.

Wherefore, said applicants pray leave to file their said petition for mandamus as aforesaid.

H. S. Priest,

Chester H. Krum

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For Applicants.

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DEC 7 1911
JAMES H. McKENN
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 10 Original.

EX PARTE THE MERCHANTS' STOCK AND GRAIN COMPANY, et al.,

Petitioners.

Motion to Make Rule Absolute.

CHESTER H. KRUM,
HENRY S. PRIEST,
For Petitioners.

St. Louis Law Printing Co., Printers' Bldg. Main 1819.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 10 Original.

EX PARTE THE MERCHANTS' STOCK AND GRAIN COMPANY, et al.,

Petitioners.

Motion to Make Rule Absolute.

Now come the said petitioners and move the Court to make absolute the rule issued in the above-entitled cause June 16, 1911, and as ground of said motion the said petitioners show:

That the return of the respondents shows that the United States Circuit Court of Appeals for the Eighth Judicial Circuit has jurisdiction of the writ of error, whose dismissal by that Court led to this proceeding.

That the return and record now before this Court show that the proceeding for contempt out of which grew the writ of error dismissed by said Court of Ap-

peals is a criminal proceeding reviewable on writ of error.

That the return of respondents shows that it is the duty of said Court of Appeals to entertain jurisdiction of the writ of error by them dismissed.

Wherefore petitioners say a peremptory writ of mandamus should be granted against said respondents and said Court.

Chester H. Krum

H. S. Priest

For Petitioners.

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DEC 7 1911
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 10 Original.

EX PARTE THE MERCHANTS' STOCK AND GRAIN COMPANY, et al.,

Petitioners.

POINTS AND MEMORANDUM ON MOTION FOR PEREMPTORY WRIT.

CHESTER H. KRUM,
HENRY S. PRIEST,
For Petitioners.

St. Louis Law Printing Co., Printers' Bldg., Main 2810.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 10 Original.

EX PARTE THE MERCHANTS' STOCK AND GRAIN COMPANY, et al.,

Petitioners.

POINTS AND MEMORANDUM ON MOTION FOR PEREMPTORY WRIT.

I.

The motion should prevail, unless the Court is prepared to reverse Ex parte Christensen Engineering Company, 194 U. S. 458, 48 Law Ed. 1072.

1. In the **Christensen** case, the **United States** were awarded **one-half** of the fine.

This Court said that **"the fine payable to the United States was clearly punitive and in vindication of the authority of the Court, and we think, as such, it dominates the proceeding and fixes its character"**.

Christensen, 194 U. S. 458, 48 Law Ed. 1072.

2. In the **present case**, the **United States** were awarded one-fourth of the fine.

The United States Court of Appeals of the Eighth Circuit says, that this award is negligible and has no dominating force.

The question then is, what constitutes **punishment**—the degree, or the penalty. If one is punished by a fine, what difference can it make whether he is fined much or little? It is the fact that the fine is punitive which characterizes the proceeding in which the fine is imposed and not the amount of the fine. A fine is a pecuniary punishment imposed upon a person convicted of crime. In the absence of statutory provisions to the contrary, it can only be the result of a criminal proceeding. Penalty and fine are not synonymous terms, although the term "fine" has been held to be broad enough to include the term penalty. Accurately defined, a fine is the pecuniary punishment of an offense, inflicted by the sentence of a Court in the exercise of criminal jurisdiction.

Hauscomb v. Russell, 11 Gray, Mass. 373, 374.

II.

MEMORANDUM.

Some confusion seems to result from the adjudications upon "contempt" cases even in the opinions of the learned Judges who have spoken for this court. But the confusion is only apparent and seems to result more from the embarrassments of the immediate case than from the principles upon which the questions have depended.

First, this Court said in **Gomper's** case, that

"contempts are neither wholly civil nor altogether criminal".

Bessette v. Conkey Co., 194 U. S. 48, L. Ed. 1002, is quoted with approval, where the learned Judge who spoke for the court said: "**It may not always be easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both**"; and where he also characterized a contempt proceeding as being *sui generis*—perhaps a convenient characterization, but calculated to lead to confusion.

Secondly, this Court said, in **New Orleans v. Steamship Company**, 20 Wall, 22 L. Ed. 357: "**Contempt of Court is a specific criminal offense. The imposition of the fine was a judgment in a criminal case. That part of the decree is as distinct as if it were a judgment upon an indictment for perjury committed in a deposition read at the hearing.**"

Thirdly, this Court in **Gomper's** case determined, that the proceeding was for civil contempt, and a part of the equity cause:

1. **Because the petition was entitled as of the equity cause.**
2. **Because costs were adjudged in favor of complainant.**
3. **Because defendants were made witnesses against themselves.**
4. **Because the petition in the contempt matter prayed for general relief.**

Apparently, the conclusion reached in **Gomper's** case leaves the question whether a given proceeding for contempt is civil or criminal too much dependent upon the views of the parties to the proceeding. Letting this be as it may, there is nothing in **Gomper's** case to militate against the contention of the petitioners now before this Court.

1. **It is true that the Board of Trade filed an information entitled as follows:**

"**Information in Contempt.**"

"In the Circuit Court of the United States for the Eastern District of Missouri, Eastern Division, Board of Trade of the City of Chicago, No. 5785, v. Merchants Stock and Grain Company et al."

2. But the information asked that defendants be required to show cause why they should not be **PUNISHED** for contempt;

3. The defendants, petitioners here, were not made witnesses by the prosecutor;

4. They insisted that the proceeding was **CRIMINAL** and that they were entitled to be confronted by the witnesses in open court;

5. There was no prayer for general relief in the information;

6. There was no adjudication of costs to a complainant.

The defendants, petitioners here, contended throughout that the proceeding was a criminal one.

So that, however **Gomper's** case may be considered, there is nothing in it to militate against the rule of determination as laid down in the **Christensen** case.

III.

After all, does not **Gomper's** case afford the principle which should control in such cases:

> "The distinction between refusing to do an act commanded (remedied by imprisonment until the party performs the required act) and doing an act forbidden (punished by imprisonment for a definite term) is sound in principle and generally, if not universally, affords a test by which to determine the character of the punishment."

The extent of the punishment does not here control, nor whether there is a fine or imprisonment. **It is the nature of the order made upon him accused of contempt which determines whether the proceeding for contempt is a civil, or a criminal, proceeding.**

As indicated in Gomper's case:

1. **Civil contempt is committed where a defendant has refused to do an affirmative act ordered to be done for the benefit of the opposite party. The proceeding for contempt in such a case is civil, because it is remedial, and alone for the benefit of the opposite party.**

2. **Criminal contempt is committed where a defendant has done an act, which he has been forbidden to do. The penalty is imposed as "punishment for the completed act of disobedience".**

The petitioners for *mandamus* were fined, but they were fined for "a completed act of disobedience". They had **disobeyed a prohibitive order of injunction,** they had **violated a writ of the Court,** they had been in **contempt of the dignity and prerogative of the Court** as such, if they had committed a contemptuous act in any respect. The proceeding instituted against them was one independent of the cause in which the restraining order was made and it was a criminal proceeding because it sought to **punish** the petitioners for an alleged "completed act of disobedience". Any view to the contrary must lead to the conclusion, that in a suit in equity in a Circuit Court of the United States there can be no proceeding for a criminal contempt, which it is respectfully submitted is manifestly untenable.

IV.

Suggestions, by way of points and memorandum, have been made on the basis of the law, as the Courts have made such law.

Doubtless too late to attempt anything **new** in the line of the law of contempts.

But consideration being had to the fact that it is **contempt of Court,** rather than of **parties** which concerns us, should not the rule be:

1. The statute limiting **punishment** to fine, or imprisonment, must be considered—the Circuit Court being a creature of Congress. Rev. Stat. Sec. 725.

2. Where **punishment** is sought, the proceeding is not **remedial, or civil,** but **punitive and criminal.**

3. The **act** sought to be punished is to be regarded, rather than the **mere form of the procedure** instituted to accomplish the end, and rather than the **views of the parties** who may have participated in the proceedings.

4. Information must be made, notice given and opportunity afforded for defense.

5. The accused is not entitled to trial by jury.

6. Mere irregularities will not avoid a judgment in contempt.

7. But one charged has the same "inalienable right to be heard in his defense that he would have if charged with murder, or any other crime".

Boyd v. Glucklich, 116 Fed. 134.

"It is a criminal offense, for which the punishment may be imprisonment without limit of duration."

Id., 134.

8. The evidence adduced must be sufficient to exclude every other reasonable hypothesis but that of guilt.

Boyd v. Glucklich, 116 Fed. 140;
Gomper's case, *supra.*

9. The accused shall enjoy the right to be **confronted** by the witnesses against him.

10. Whether the proceeding is entitled as of some main cause, or as an independent proceed-

ing, a fine can be imposed only by way of **punishment.**

Robinson ex parte, 19 Wall. 512;
U. S. ex rel., etc., 16 Fed. 853.

It is respectfully submitted that the motion to make the rule absolute should be sustained and the writ of *mandamus* be awarded as prayed.

Chester H. Ch
H. S. Priest
For Petitioners.

Office Supreme Court, U. S.
FILED.
OCT 10 1911
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1911.

No. 10, Original.

IN THE MATTER OF
MERCHANTS STOCK & GRAIN COMPANY, FRANK J. MINER and PATRICK A. STEPHENS, *Petitioners.*

PETITION FOR MANDAMUS.

Return of Respondents to Order to Show Cause.

HENRY S. ROBBINS,
Counsel for Respondents.

BARNARD & MILLER PRINT, CHICAGO

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1911.

IN THE MATTER OF
MERCHANTS STOCK & GRAIN COMPANY, FRANK J. MINER AND PATRICK A. STEPHENS,
Petitioners.

PETITION FOR MANDAMUS.

RETURN OF RESPONDENTS TO ORDER TO SHOW CAUSE.

To the Honorable, the Judges of the Supreme Court of the United States:

Respondents, Walter H. Sanborn, Elmer B. Adams and William H. Munger (erroneously called Thomas C. Munger in the petition herein), judges of the Circuit Court of Appeals for the Eighth Judicial Circuit, appearing by counsel before this Honorable Court, hereby show the following cause why the peremptory writ of mandamus should not be issued by this court as prayed in said petition.

I. Respondents admit the filing of the bill in equity by the Board of Trade of the City of Chi-

cago and the issuance thereon of the preliminary injunction as alleged in said petition; also that a pleading entitled "An Information in Contempt" (a copy of which is made a part hereof as Exhibit A); which pleading professed to be the pleading of, and was signed by, Board of Trade of the City of Chicago, complainant in said original suit, and by the same counsel who appeared as complainant's counsel in said injunction suit, was subsequently to the issuance of said injunction filed in said Circuit Court by the complainant therein, and that the same was supported by affidavits, all of which affidavits, as well as such pleading, were entitled and filed in said suit, in which said temporary injunction had been issued, the title thereof being "*Board of Trade of the City of Chicago* v. *Merchants Stock & Grain Company et al.*, No. 5785." And that thereafter an order to show cause was entered in said injunction suit, as follows:

IN THE CIRCUIT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF MISSOURI,
EASTERN DIVISION.

Board of Trade of the City of Chicago *vs.* Merchants Stock & Grain Company *et al.*	No. 5785.

This cause coming on upon the information of complainant charging violations of the temporary injunction heretofore issued herein, and the affidavits filed on behalf of complainant in support of said information and charges, and after hearing said

information and affidavits, and being fully advised in the premises,

IT IS HEREBY ORDERED that the defendants, Merchants Stock & Grain Company, John F. Ryan, Francis J. Miner, Peter Holmes, Patrick A. Stephens, P. B. Burch, Percy Anderson, Charles S. Sparkman, Frank Mullen, Ralph McDonough, Joseph E. Martin and Clyde Pumphrey, and each of them, appear before this court, in the United States Circuit Court Room, Federal Building, City of St. Louis, Missouri, on the 4th day of January, 1910, at 10 o'clock A. M., and show cause why they, and each of them, should not be punished for contempt of this court in violating the injunction heretofore issued in this cause.

II. These respondents admit that the defendants in said suit made return to said order to show cause as alleged in the petition herein, and show that a replication of complainant (Board of Trade of the City of Chicago) in said original suit to said return was filed, entitled therein and signed by the same counsel for said Board of Trade, and that subsequently the following order of reference was entered in said cause:

IN THE CIRCUIT COURT OF THE UNITED STATES,
FOR THE EASTERN DIVISION OF THE EASTERN
JUDICIAL DISTRICT OF MISSOURI.

Board of Trade of the City of Chicago,
Complainant,
No. 5785 *vs.*
Merchants Stock and Grain Company, *et al.,*
Defendants.

This cause coming on for hearing upon the complainant's information in contempt, the order to show cause made thereon, and the defendants' return to said order, said parties appearing by the respective solicitors, and thereupon the Court of its own motion doth order that Robert M. Fulton, Esq., be and he is hereby appointed special examiner to take testimony within or without this district on behalf of both parties upon the issues raised by said petition, order and return, and either party to this action is hereby directed to produce before said examiner any books or papers that may be material to said issues.

It is further ordered that said examiner begin the taking of such testimony on January 10, 1910, and continue the taking of the same from day to day until completed.

III. Respondents further show that thereafter the petitioners herein (defendants in said suit) subsequently filed in said Circuit Court a motion entitled in said suit to set aside said order of reference, and said circuit judge entered in said cause in said

Circuit Court an order denying said motion, and that after the taking of much evidence before said special master and return thereof into the said Circuit Court, these respondents admit that the Circuit Court entered the order or judgment adjudging the defendants guilty of contempt, which is set out in the petition herein, and that subsequently by writ of error said proceeding was duly brought to the United States Circuit Court of Appeals for the Eighth Circuit, over which your respondents were then presiding, and that a complete record of said proceedings was duly filed in that court, together with assignments of error and briefs by the petitioners herein, and these respondents show that a brief was also filed by the Board of Trade of the City of Chicago, through Henry S. Robbins, Martin H. Foss and Sears Lehmann, as its counsel, who are shown by said record to have been also counsel for the complainant in said suit for injunction.

IV. These respondents further aver that the record so filed in said Circuit Court of Appeals also disclosed that every pleading, affidavit or other paper filed, and every order entered in said Circuit Court in said proceeding for contempt was entitled in the original suit, to wit: *Board of Trade of the City of Chicago* v. *Merchants Stock & Grain Company et al.*, and in many cases to said title was added "No. 5785," and that it appeared from such record so filed that no other counsel had appeared in said contempt proceeding except said Henry S. Robbins, Martin H. Foss and Sears Lehmann, who appeared therein as counsel only for the Board of Trade of the City of Chicago, and that said persons were also

the counsel for such complainant in the original cause.

V. These respondents further show that it is true, as alleged in said petition, that these respondents, then constituting the United States Circuit Court of Appeals for the Eighth Circuit, after investigating the briefs and hearing the arguments of counsel for these petitioners, as well as of the said counsel for said Board of Trade, did enter an order dismissing said writ of error for want of jurisdiction, and state the reasons which led these respondents to do so in a written opinion filed therein, as follows:

Syllabus.

1. CONTEMPT—"CIVIL CONTEMPTS"—"CRIMINAL CONTEMPTS"—DISTINCTION.

Contempts are of two classes: "Criminal contempts," which are prosecuted to preserve the power and vindicate the dignity of the courts and to punish the offender; and "civil contempts," which are prosecuted to preserve and enforce the rights of private parties and to compel obedience to orders and decrees to enforce the rights and administer the remedies to which the court has found or may find the private parties to be entitled.

2. CONTEMPT—JUDGMENTS FOR, HOW REVIEWABLE IN SUITS IN EQUITY.

A judgment for a criminal contempt committed in the progress of a suit in equity is reviewable by writ of error only.

A judgment against a party to a suit in equity for a civil contempt committed therein before final decree is reviewable by appeal from the final decree only.

A judgment against a party for a civil contempt committed after the final decree is reviewable by appeal.

3. CONTEMPT—JUDGMENT FOR VIOLATION OF TEMPORARY INJUNCTION IN EQUITY SUIT A CIVIL CONTEMPT.

A judgment that the defendants in a pending equity suit are guilty of contempt of court for the violation of an interlocutory injunction issued against them at the instance of the complainant, and that they pay fines therefor, three-fourths to the complainant and one-fourth to the government, is for a civil contempt, and is reviewable by appeal from the final decree only, because the chief purpose of the proceeding is to prevent irreparable injury to the complainant and to preserve its property *pendente lite*, because the complainant is the party chiefly interested in it and the party that commenced and conducted the proceedings for the contempt, because the proceeding is for an act done by parties to a suit in disobedience of a special order made in behalf of their opponent in that suit, and because the dominant effect as well as the object of the proceeding is to coerce the defendants to obey the injunction for the purpose of preserving the property of the complainant, and the punitive element in it is subordinate, incidental, and negligible.

SANBORN, Circuit Judge, delivered the opinion of the court:

The plaintiffs in error complain that they were found guilty of contempt of court and fined for a violation of an interlocutory injunction issued in a pending suit in equity brought against them by the Board of Trade of Chicago. As the suit in equity has not passed to final decree, the first question is whether or not the judgment of contempt is reviewable by writ of error; for the rule is well settled that, while a judgment for a criminal contempt may be challenged by a writ of error (Act March 3, 1891, c. 517, § 6, 26 Stat. 828 [U. S. Comp. St. 1901, pp. 549, 550]; *Bessette* v. *W. B. Conkey Company*, 194 U. S. 324,

338, 24 Sup. Ct. 665, 48 L. Ed. 997; Matter of Christensen Engineering Co., 194 U. S. 458, 461, 24 Sup. Ct. 729, 48 L. Ed. 1072), a judgment against a party to a suit in equity for a civil contempt is reviewable by appeal only (*Doyle* v. *London Guarantee Company*, 204 U. S. 599, 602, 603, 605, 607, 27 Sup. Ct. 313, 51 L. Ed. 641; *Ex parte* Heller, 214 U. S. 501, 502, 29 Sup. Ct. 698, 53 L. Ed. 1060; *Webster Coal Co.* v. *Cassatt*, 207 U. S. 181, 28 Sup. Ct. 108, 52 L. Ed. 160; *Clay* v. *Waters*, 101 C. C. A. 645, 178 Fed. 385, 391, 392).

The injunction in this case was issued at the instance of the Board of Trade, to protect it from irreparable injury until the final decree could be rendered in the suit. The defendants in the suit, the plaintiffs in error here, must be assumed, for the purpose of the decision of this preliminary question, to have violated this injunction, and to have inflicted serious injury upon the Board while the suit was pending, and the court fined them for these unlawful acts, and ordered three-fourths of the fines to be paid to the Board and one-fourth thereof to the United States.

Counsel for the defendants below argue that this is a judgment for a criminal contempt, because one-fourth of the fines are to be paid to the United States, and because the true line of demarcation between civil contempts and criminal contempts in their opinion was drawn by the Supreme Court of South Dakota in *State* v. *Knight*, 3 S. D. 509, 514, 54 N. W. 412, 413, 44 Am. St. Rep. 809, and the contempt here in question falls on the criminal side of that line. That court said:

"If the contempt consists in the refusal of a party to do something which he is ordered to do for the benefit or advantage of the opposite party, the process is civil, and he stands committed until he complies with the order. * * *

If, on the other hand, the contempt consists in the doing of a forbidden act, injurious to the opposite party, the proceeding is criminal, and conviction is followed by fine or imprisonment, or both; and this is by way of punishment. * * * This rule, as definitely stated, has not been expressly recognized by any case coming under our observation, but it is consistent with all the decisions."

The opinion from which these quotations are made was written in the year 1893. While the line of demarcation there drawn may not have been inconsistent with any opinions coming under the eyes of the Supreme Court of South Dakota at that time, it is inconsistent with the later decisions of the Supreme Court of the United States. In *Ex parte* Heller, 214 U. S. 501, 29 Sup. Ct. 698, 53 L. Ed. 1060, Heller had been enjoined from using a certain trade-mark and from stamping waistbands in a certain manner, and the court that rendered the decree had adjudged him to be in contempt for violating the injunction, and had fined him $500. He had sued out a writ of error to the Circuit Court of Appeals of the Second Circuit, and that court had dismissed his writ, on the ground that the contempt was not criminal. Heller had then applied to the Supreme Court for a mandamus to compel the Court of Appeals to take jurisdiction of and to decide his case on the merits of the writ of error, and the Supreme Court dismissed his petition, after quoting from the opinion of the Court of Appeals this declaration:

"It is well settled that, when an order imposing a fine for a violation of an injunction is substantially one to reimburse the party injured by the disobedience, it is to be reviewed only by appeal."

The truth is that substantial benefit to a private party preponderating over that to the government is the distinguishing characteristic of a civil contempt, and that benefit is often as great and it arises as frequently from judg-

ments for contempts for disobedience of a prohibitory as of a mandatory order or judgment. In view of this fact, and of the decisions of the Supreme Court which have been cited, we adhere to our earlier statement of the nature and of the distinction between criminal and civil contempts which was made in *Re* Nevitt, 54 C. C. A. 622, 632, 117 Fed. 448, 458, was approved by the Supreme Court in *Bessette* v. *W. B. Conkey Company*, 194 U. S. 324, 328, 24 Sup. Ct. 665, 48 L. Ed. 997, and was affirmed by this court in *Clay* v. *Waters*, 101 C. C. A. 645, 178 Fed. 385, 389, which reads:

"Proceedings for contempts are of two classes—those prosecuted to preserve the power and vindicate the dignity of the courts and to punish for disobedience of their orders and those instituted to preserve and enforce the rights of private parties to suits and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the government, the courts, and the people, are interested in their prosecution. The latter are civil, remedial, and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce. *Thompson* v. *Railroad Company*, 48 N. J. Eq. 105, 108 [21 Atl. 182]; *Hendryx* v. *Fitzpatrick* (C. C.) 19 Fed. 810; *Ex parte* Culliford, 8 Barn. & C. 220; *Rex* v. *Edwards*, 9 Barn. & C. 652; *People* v. *Court of Oyer & Terminer*, 101 N. Y. 245, 247 [4 N. E. 259, 54 Am. Rep. 691]; *Phillips* v. *Welch*, 11 Nev. 187, 190; *State* v. *Knight*, 3 S. D. 509, 513 [54 N. W. 412, 44 Am. St. Rep. 809]; *People* v. *McKane*, 78 Hun 154, 160, 28 N. Y. Supp. 981; 7 Am. & Eng. Enc. Law, 68."

The proceedings upon which the defendants below were adjudged to pay their fines were instituted and conducted, not by the government

for an affront to the dignity of the court, but by the complainant below, the Board of Trade of Chicago, to protect its property from continuing trespasses, and to save itself from irreparable injury *pendente lite*. They were based on its petition, and its counsel presented the evidence in support of it. Neither the United States attorney, nor any other officers of the government, nor any representative of the people, took any part in the prosecution or had any especial interest therein. The purpose of the proceeding was to protect the Board from irreparable injury, and its property, its continuous quotations of the market reports, from continuing trespasses and appropriation by the defendants, by enforcing the injunction which the court had granted to the complainant for that very purpose. The chief object of the fines was to coerce the defendants to obey the injunction during the pendency of the suit and to reimburse the complainant for the expenses of its prosecution of the proceedings for contempt.

It is true that the court below directed that one-fourth of the fines should be paid to the government, and that the Supreme Court held, in Matter of Christensen Engineering Company, 194 U. S. 458, 461, 24 Sup. Ct. 729, 48 L. Ed. 1072, where one-half of the fine was payable to the United States, that the punitive element dominated the proceeding in that case, and made the contempt criminal, and not civil. But in the case at bar the punitive element was incidental, and the civil purpose to protect the property of the complainant was the only real object of the proceeding. The court below never estimated an affront to its dignity and a defiance of its power at one-third of the expense of the proceedings or of the value of complainant's property taken in violation of the injunction. It ordered three-fourths of the fines paid to the complainant and one-fourth to the government for the single dominant object of the proceed-

ings, for the purpose of protecting and preserving the complainant's property and coercing the complainant to obey its injunction that this purpose might be accomplished.

In every civil as well as in every criminal contempt there necessarily inheres an affront to the dignity and a defiance of the power of the court and a liability to punishment therefor. The liability to punishment for an affront to the dignity of the court cannot, therefore, distinguish a civil from a criminal contempt, for it always exists in each. Yet every contempt is either a civil contempt or a criminal contempt. What, then, is the distinguishing characteristic between them? It is the dominating object of the prosecution and the party chiefly interested therein. If the chief purpose of the proceeding for contempt is to enforce the rights and administer the remedies to which courts have adjudged or may adjudge a private party to be entitled, and if such a private party is the one chiefly interested in it, the proceeding is for a civil contempt. If the chief object of the prosecution, as in cases of misconduct in court, or of disobedience of a subpoena, is, by punishment of the offender, to preserve the power and vindicate the dignity of the court, and if the party chiefly interested in the prosecution is the government or the public, the proceeding is for a criminal contempt. Debs was sentenced to imprisonment for six months for a violation of a preliminary injunction in a suit in equity. Mr. Justice Brewer said of the proceeding against him and his associates for this contempt:

"The complaint made against them in this is of disobedience to an order of a civil court, made for the protection of property and the security of rights." *In re* Debs, 158 U. S. 565, 594, 15 Sup. Ct. 900, 39 L. Ed. 1092.

"In brief, a court, enforcing obedience to its orders by proceedings for contempt, is not executing the criminal laws of the land, but only

securing to suitors the rights which it has adjudged them entitled to." 158 U. S. 596, 15 Sup. Ct. 911 (39 L. Ed. 1092).

And at 158 U. S. 599, 15 Sup. Ct. 912 (39 L. Ed. 1092), he said:

"That the proceeding by injunction is of a civil character, and may be enforced by proceedings in contempt, that such proceedings are not in execution of the criminal laws of the land."

In *Bessette* v. *W. B. Conkey Company*, 194 U. S. 324, 24 Sup. Ct. 665, 48 L. Ed. 997, where the violation of an injunction by one who was not a party to the suit was held to be, like misconduct in the court room, a criminal contempt, Mr. Justice Brewer said that an act might partake of the characteristics of both a civil and of a criminal contempt, but that:

"A significant and generally determinative feature is that the act is by one party to a suit in disobedience of a special order made in behalf of the other. Yet sometimes the disobedience may be of such a character and in such a manner as to indicate contempt of the court, rather than a disregard of the rights of the adverse party."

Every act, as we have seen, which constitutes a civil contempt, unavoidably partakes of the characteristics of both a civil contempt and a criminal contempt, because it is necessarily punishable for its affront to the dignity of the court. But the proceeding for contempt is for a civil contempt, and not for a criminal contempt, although its incidental effect may be punitive, if the chief and dominating purpose and effect of the proceeding is to protect the property of a private party to a suit, if the party chiefly interested in the proceeding is such a private party, and if the "act is by one party to a suit in disobedience of a special order made in behalf of the other."

The proceeding in the case at bar was clearly of this character. Not only the dominant, but

in reality the sole, purpose of it was to protect the property of the complainant *pendente lite* by coercing the defendants to obey the injunction issued for that purpose. The party chiefly interested in it was the Board of Trade, and that board instituted and conducted the proceeding, the acts which constituted the contempt were committed by the defendant in a suit in equity in disobedience of a temporary injunction issued in behalf of the complainant, the main effect, as well as the object of the judgment for contempt, is to coerce the defendants to obey the injunction and to cease their continuing appropriation of the complainant's property, and the punitive element in it is subordinate, incidental, and, so far as the discussion and determination of this question is concerned, negligible. The proceeding in this case was, therefore, for a civil, and not for a criminal, contempt, the judgment for the contempt was in reality an interlocutory order in the equity suit, and it is reviewable by appeal from the final decree only.

Any other practice in suits in equity would in effect render interlocutory injunctions and orders futile, would deprive courts of equity of their salutary power to protect parties from irreparable injury, to control the subject-matter and the parties, and to require the production of evidence *pendente lite*, and would produce intolerable delay in the prosecution of suits in equity. If, every time that a temporary injunction or an interlocutory order in an equity suit were made, parties to the suit might disobey it, submit to an order or judgment for contempt, and then by writ of error and supersedeas suspend that judgment until an appellate court could review it, the wrongs to prevent which such injunctions issue might be perpetrated before the hearings in the appellate court on the judgments for contempts could be had, and prosecutions of suits in equity might be indefinitely delayed, while parties awaited the decisions of

appellate courts upon writs of error challenging the judgments for contempts for disobedience of interlocutory orders regarding the production of evidence and other matters relevant to the conduct of such suits. A practice of this nature should not be approved or permitted, and the writ of error must be dismissed. *Doyle* v. *London Guarantee & Accident Company*, 204 U. S. 599, 602, 603, 607, 27 Sup. Ct. 313, 51 L. Ed. 641.

It is so ordered.

Respondents further aver that while they were, at the time of the dismissal of said order, and still are, of the opinion that said Circuit Court of Appeals of the Eighth Circuit, had no jurisdiction to entertain said writ of error, if this court should decide otherwise, these respondents will comply with the directions of this court, and hear said cause.

Wherefore, these respondents ask that they may be hence dismissed with their reasonable costs in this behalf.

WALTER H. SANBORN,
ELMER B. ADAMS,
WM. H. MUNGER,
Judges of the United States Court of Appeals for the Eighth Judicial Circuit.

HENRY S. ROBBINS,
Counsel for Respondents.

EXHIBIT "A."

IN THE CIRCUIT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF MISSOURI,
EASTERN DIVISION.

Board of Trade of the City of Chicago
vs.
Merchants Stock & Grain Company *et al.*
} No. 5785.

To the Honorable David P. Dyer, Judge of Said Court:

Now comes Board of Trade of the City of Chicago, and represents to the court that on the 21st day of October, 1909, it filed in this court its certain bill of complaint for an injunction against Merchants Stock & Grain Company, John F. Ryan, Francis J. Miner, Peter Holmes, Patrick A. Stephens, P. B. Burch, Percy Anderson, Charles S. Sparkman, Frank Mullen, Ralph McDonough, Joseph E. Martin and Clyde Pumphrey; and thereupon there was issued out of said court, and served upon each of said above named defendants an order to show cause why an injunction should not issue in accordance with the prayer of said bill, to which order to show cause the defendants above named, on the 30th day of October, 1909, filed a return, together with their affidavits in resistance of said prayer for injunction. That thereafter, and on the 3rd day of November, 1909, this court duly issued in said suit a temporary injunction, wherein and whereby this court restrained the said Merchants Stock & Grain Company, John F. Ryan,

Francis J. Miner, Peter Holmes, Patrick A. Stephens, P. B. Burch, Percy Anderson, Charles S. Sparkman, Frank Mullen, Ralph McDonough, Joseph E. Martin and Clyde Pumphrey, and each of them, either acting in its or his own behalf, or as a member of any firm, or as an agent or officer of any other person, firm or corporation, and also each and every of the agents, employes and servants of each of said defendants, from receiving, using, selling or distributing, directly or indirectly, the quotations of the Board of Trade of the City of Chicago, or any of them, and from having, maintaining, or permitting, any telegraph or other wire running into or through its, his, or their office, over which said quotations are passing, and from aiding, abetting, or assisting, directly or indirectly, any person, firm or corporation in receiving, using, selling or distributing said quotations, until it, he, or they, or the person, firm or corporation for which they or any of them shall be acting as agent, officer or employe, shall have first lawfully acquired the right to receive said quotations either by contract or purchase from said Board of Trade, or, with its consent, from some telegraph company authorized by said Board of Trade to distribute said quotations. And thereupon said defendants and each of them was apprised and knew of the entry of said injunction order and the scope and terms thereof.

That thereafter, and on the 4th day of November, 1909, a writ of injunction issued out of this court in accordance with the injunctive order theretofore entered, which said writ of injunction was duly served by the United States marshal for said dis-

trict upon said defendants, Merchants Stock & Grain Company, P. B. Burch, Patrick A. Stephens, Percy Anderson, Charles S. Sparkman, Frank Mullen, Ralph McDonough and Clyde Pumphrey on the 5th day of November, 1909; and upon the defendants John F. Ryan, Francis J. Miner, Peter Holmes and Joseph E. Martin on the 11th day of November, 1909, as will more fully appear by an inspection of said writ and the marshal's return thereupon, and thereby each of said defendants was, and has ever since been, fully informed of the mandates and requirements of said writ; and that said injunction is still in full force and effect, and has been ever since the same was issued.

That at the time of the filing of said bill of complaint, and on the dates and during the times hereinafter mentioned, said Merchants Stock & Grain Company was maintaining its main or principal offices in the City of St. Louis, State of Missouri, and also upwards of 400 branch offices or places of business in the different cities and states of the United States; and that said Francis J. Miner, John F. Ryan, Peter Holmes, Patrick A. Stephens, P. B. Burch, Percy Anderson, Charles S. Sparkman, Frank Mullen, Ralph McDonough, Joseph E. Martin and Clyde Pumphrey, were owners, officers, employes or agents of said Merchants Stock & Grain Company, and were aiding and assisting said Merchants Stock & Grain Company in maintaining its said main office and its said branch offices. That on said dates and during all the times hereinafter stated, said Merchants Stock & Grain Company had and maintained telegraph wires running from its

said main office to its said branch offices or places of business, of which wires said Merchants Stock & Grain Company had exclusive use between the hours of 9:30 A. M. and 3 P. M. of each business day; and that said defendants Merchants Stock & Grain Company, John F. Ryan, Francis J. Miner, Peter Holmes, Patrick A. Stephens, P. B. Burch, Percy Anderson, Charles S. Sparkman, Frank Mullen, Ralph McDonough Joseph E. Martin and Clyde Pumphrey have, and each of them has, since the said 6th day of November, 1909, knowingly, wilfully, wrongfully and intentionally disobeyed and violated said injunction of this court by receiving, obtaining, using and distributing said continuous quotations of the Board of Trade of the City of Chicago, and by having, maintaining and permitting telegraph or other wires running into or through their said offices over which said quotations were passing. And in further support of said charge said Board of Trade hereto annexes the following specification of violations of said injunction:

First. That on the 6th day of November, 1909, at the City of St. Louis, State of Missouri, between, to-wit, the hours of 9:58 o'clock A. M. and 10:30 A. M. of said day, the defendant Merchants Stock & Grain Company, with the aid and assistance of said defendants John F. Ryan, Francis J. Miner, Peter Holmes, Patrick A. Stephens, P. B. Burch, Percy Anderson, Charles S. Sparkman, Frank Mullen, Ralph McDonough, Joseph E. Martin and Clyde Pumphrey, and each of them, did obtain, receive and use continuous quotations of the Board of Trade of the City of Chicago, respecting and covering wheat,

corn, oats, pork, lard and short ribs, and did immediately cause said quotations there to be exposed to public view upon a blackboard in said office.

Second. That on the 8th day of November, 1909, at the City of St. Louis, State of Missouri, and between the hours of, to-wit, 9:30 A. M. and 12:46 P. M. of that day, the defendant Merchants Stock & Grain Company, with the aid and assistance of said defendants John F. Ryan, Francis J. Miner, Peter Holmes, Patrick A. Stephens, P. B. Burch, Percy Anderson, Charles S. Sparkman, Frank Mullen, Ralph McDonough, Joseph E. Martin and Clyde Pumphrey, and each of them, did obtain, receive and use continuous quotations of Board of Trade of the City of Chicago respecting and covering wheat, corn, oats, pork, lard and short ribs, and did immediately cause said quotations there to be exposed to public view upon a blackboard in said office.

Third. That on the 23d day of November, 1909, at the City of Macomb, in the State of Illinois, between, to-wit, the hours of 9:30 A. M. and 10:20 A. M. of that day, the defendant Merchants Stock & Grain Company, with the aid and assistance of said defendants John F. Ryan, Francis J. Miner, Peter Holmes, Patrick A. Stephens, P. B. Burch, Percy Anderson, Charles S. Sparkman, Frank Mullen, Ralph McDonough, Joseph E. Martin and Clyde Pumphrey, and each of them, and one James Beddows, a correspondent or agent of said Merchants Stock & Grain Company, did obtain, receive and use continuous quotations of Board of Trade of the City of Chicago, respecting and covering wheat, corn, oats, pork, lard and short ribs, and did im-

mediately cause said quotations there to be exposed to public view upon a blackboard in said office.

Fourth. That on the 24th day of November, 1909, at the City of Monmouth, State of Illinois, between the hours of, to-wit: 10:15 A. M. and 11:55 A. M. of said day, the defendant, Merchants Stock & Grain Company, with the aid and assistance of said defendants John F. Ryan, Francis J. Miner, Peter Holmes, Patrick A. Stephens, P. B. Burch, Percy Anderson, Charles S. Sparkman, Frank Mullen, Ralph McDonough, Joseph E. Martin, and Clyde Pumphrey, and each of them, and one Frank Whiteleather, a correspondent or agent of said Merchants Stock & Grain Company, did obtain, receive and use continuous quotations of Board of Trade of the City of Chicago, respecting and covering wheat, corn, oats, pork, lard and short ribs, and did immediately cause said quotations there to be exposed to public view upon a blackboard in said office.

Fifth. That on said 24th day of November, 1909, at the City of Monmouth, State of Illinois, between, to-wit: the hours of 12:50 P. M. and 1:15 P. M. of that day, the defendant Merchants Stock & Grain Company, with the aid and assistance of said defendants John F. Ryan, Francis J. Miner, Peter Holmes, Patrick A. Stephens, P. B. Burch, Percy Anderson, Charles S. Sparkman, Frank Mullen, Ralph McDonough, Joseph E. Martin, and Clyde Pumphrey, and each of them, and said Frank Whiteleather, did obtain, receive and use continuous quotations of the Board of Trade of the City of Chicago, respecting and covering wheat, corn, oats, pork, lark and short ribs, and did immediately cause

said quotations there to be exposed to public view upon a blackboard in said office.

Sixth: That on the 29th day of November, 1909, at the City of Ottumwa, State of Iowa, between to-wit: the hours of 10:05 A. M. and 11:42 A. M., of said day, the defendant, Merchants Stock & Grain Company, with the aid and assistance of said defendants John F. Ryan, Francis J. Miner, Peter Holmes, Patrick A. Stephens, P. B. Burch, Percy Anderson, Charles S. Sparkman, Frank Mullen, Ralph McDonough, Joseph E. Martin, and Clyde Pumphrey, and each of them, and one I. G. Furman, a correspondent or agent of said Merchants Stock & Grain Company, did obtain, receive and use continuous quotations of Board of Trade of the City of Chicago, respecting and covering wheat, corn, oats, pork, lard and short ribs, and did immediately cause the said quotations there to be exposed to public view upon a blackboard in said office.

Seventh: That on said 29th day of November, 1909, at the City of Ottumwa, State of Iowa, between, to-wit: the hours of 12:25 P. M. and 1:15 P. M., of said day, the defendant, Merchants Stock & Grain Company, with the aid and assistance of said defendants John F. Ryan, Francis J. Miner, Peter Holmes, Patrick A. Stephens, P. B. Burch, Percy Anderson, Charles S. Sparkman, Frank Mullen, Ralph McDonough, Joseph E. Martin, and Clyde Pumphrey, and each of them, and said I. G. Furman, did obtain, receive and use continuous quotations of Board of Trade of the City of Chicago, respecting and covering wheat, corn, oats, pork, lard and short ribs, and did immediately cause the said quotations

there to be exposed to public view upon a blackboard in said office.

Eighth: That on the 30th day of November, 1909, at the City of Ottumwa, State of Iowa, between, to-wit: the hours of 9:30 A. M. and 11:47 A. M. of said day, the defendant, Merchants Stock & Grain Company, with the aid and assistance of said defendants John F. Ryan, Francis J. Miner, Peter Holmes, Patrick A. Stephens, P. B. Burch, Percy Anderson, Charles S. Sparkman, Frank Mullen, Ralph McDonough, Joseph E. Martin, and Clyde Pumphrey, and each of them, and the said I. G. Furman, did obtain, receive and use continuous quotations of Board of Trade of the City of Chicago, respecting and covering wheat, corn, oats, pork, lard, and short ribs, and did immediately cause the said quotations there to be exposed to public view upon blackboard in said office.

Ninth: That on said 30th day of November, 1909, at the City of Ottumwa, State of Iowa, between, to-wit: the hours of 12:30 P. M. and 1:15 P. M. of said day, the defendant, Merchants Stock & Grain Company, with the aid and assistance of said defendants John F. Ryan, Francis J. Miner, Peter Holmes, Patrick A. Stephens, P. B. Burch, Percy Anderson, Charles S. Sparkman, Frank Mullen, Ralph McDonough, Joseph E. Martin, and Clyde Pumphrey, and each of them, and said I. G. Furman, did obtain, receive and use continuous quotations of Board of Trade of the City of Chicago, respecting and covering wheat, corn, oats, pork, lard and short ribs, and did immediately cause the said quotations there to be exposed to public view up a blackboard in said office.

Tenth: That on the 30th day of November, 1909, at the City of Kansas City, State of Missouri, between, to-wit: the hours of 9:50 A. M. and 11:25 A. M. of said day, the defendant, Merchants Stock & Grain Company, with the aid and assistance of said defendants John F. Ryan, Francis J. Miner, Peter Holmes, Patrick A. Stephens, P. B. Burch, Percy Anderson, Charles S. Sparkman, Frank Mullen, Ralph McDonough, Joseph E. Martin, and Clyde Pumphrey, and each of them, and E. F. Parks & Co., correspondents or agents of said defendant Merchants Stock & Grain Company did obtain, receive and use continuous quotations of Board of Trade of the City of Chicago, respecting and covering wheat, corn, oats, pork, lard and short ribs, and did immediately cause the said quotations there to be exposed to public view upon a blackboard in said office.

Eleventh: That on the 17th day of December, 1909, at the City of St. Louis, State of Missouri, between, to-wit: the hours of 9:30 A. M. and 10:23 A. M. of said day, the defendant, Merchants Stock & Grain Company, with the aid and assistance of said defendants John F. Ryan, Francis J. Miner, Peter Holmes, Patrick A. Stephens, P. B. Burch, Percy Anderson, Charles S. Sparkman, Frank Mullen, Ralph McDonough, Joseph E. Martin and Clyde Pumphrey, and each of them, did obtain, receive and use continuous quotations of Board of Trade of the City of Chicago, respecting and covering wheat, corn, oats, pork, lard and short ribs, and did immediately cause the said quotations there to be exposed to pub lic view upon a blackboard in said office.

Twelfth: That on, to wit: the 6th, 8th, 23d, 24th, 29th and 30th days of November, 1909, and the 17th day of December, 1909, and each of them, between the hours of 9:30 o'clock A. M. and 1:15 P. M., at the City of St. Louis, State of Missouri, the defendant, Merchants Stock & Grain Company, with the aid and assistance of said defendants John F. Ryan, Francis J. Miner, Peter Holmes, Patrick A. Stephens, P. B. Burch, Percy Anderson, Charles S. Sparkman, Frank Mullen, Ralph McDonough, Joseph E. Martin and Clyde Pumphrey, and each of them, did have, maintain and permit a telegraph or other wire or wires running into or through its office over which continuous quotations of Board of Trade of the City of Chicago, respecting and covering wheat, corn, oats, pork, lard and short ribs, were passing.

Thirteenth: That on, to wit: the 23d day of November, 1909, at the City of Macomb, State of Illinois, between the hours of 9:30 A. M. and 10:20 A. M., the defendant, Merchants Stock & Grain Company, with the aid and assistance of said defendants John F. Ryan, Francis J. Miner, Peter Holmes, Patrick A. Stephens, P. B. Burch, Percy Anderson, Charles S. Sparkman, Frank Mullen, Ralph McDonough, Joseph E. Martin and Clyde Pumphrey, and one James Beddows, a correspondent or agent of said Merchants Stock & Grain Company, did have, maintain and permit a telegraph or other wire to run into or through its office, over which continuous quotations of Board of Trade of the City of Chicago were passing.

Fourteenth: That on, to wit: the 24th day of November, 1909, at the City of Monmouth, State of Illi

nois, between the hours of 10:15 A. M. and 1:15 P. M., of said day, the defendant Merchants Stock & Grain Company, with the aid and assistance of said defendants John F. Ryan, Francis J. Miner, Peter Holmes, Patrick A. Stephens, P. B. Burch, Percy Anderson, Charles S. Sparkman, Frank Mullen, Ralph McDonough, Joseph E. Martin and Clyde Pumphrey, and one Frank Whiteleather, a correspondent or agent of said Merchants Stock & Grain Company, did have, maintain and permit a telegraph or other wire to run into or through its office, over which continuous quotations of Board of Trade of the City of Chicago were passing.

Fifteenth: That on, to wit: the 29th day of November, 1909, at the City of Ottumwa, State of Iowa, between the hours of 10:05 A. M. and 1:15 P. M., of said day, the defendant Merchants Stock & Grain Company, with the aid and assistance of said defendants John F. Ryan, Francis J. Miner, Peter Holmes, Patrick A. Stephens, P. B. Burch, Percy Anderson, Charles S. Sparkman, Frank Mullen, Ralph McDonough, Joseph E. Martin and Clyde Pumphrey, and one I. G. Furman, a correspondent or agent of said Merchants Stock & Grain Company, did have, maintain, and permit a telegraph or other wire to run into or through its office, over which continuous quotations of Board of Trade of the City of Chicago were passing.

Sixteenth: That on, to wit: the 30th day of November, 1909, at the City of Ottumwa, State of Iowa, between the hours of 9:30 A. M. and 1:15 P. M., of said day, the defendant Merchants Stock & Grain Company, with the aid and assistance of said defend-

ants John F. Ryan, Francis J. Miner, Peter Holmes, Patrick A. Stephens, P. B. Burch, Percy Anderson, Charles S. Sparkman, Frank Mullen, Ralph McDonough, Joseph E. Martin and Clyde Pumphrey and said I. G. Furman, did have, maintain and permit a telegraph or other wire to run into or through its office, over which continuous quotations of Board of Trade of the City of Chicago were passing.

Seventeenth: That on, to wit: the 30th day of November, 1909, at the City of Kansas City, State of Missouri, between the hours of 9:30 A. M. and 11:25 A. M., of said day, the defendant Merchants Stock & Grain Company, with the aid and assistance of said defendants John F. Ryan, Francis J. Miner, Peter Holmes, Patrick A. Stephens, P. B. Burch, Percy Anderson, Charles S. Sparkman, Frank Mullen, Ralph McDonough, Joseph E. Martin, and Clyde Pumphrey, and E. F. Parks & Co., correspondents or agents of said defendant Merchants Stock & Grain Company, did have, maintain and permit a telegraph or other wire to run into or through its office, over which continuous quotations of Board of Trade of the City of Chicago were passing.

Eighteenth. That on, to-wit: the 21st day of October, 1909, said Merchants Stock & Grain Company was receiving from some source unknown to said Board of Trade of the City of Chicago, its continuous market quotations, and was using the same and disseminating them over its telegraph or other wires to its said several branch offices or places of business, where the same were being posted upon blackboards and used in the business conducted in said offices, and the said John F. Ryan, Francis J.

Miner, Peter Holmes, Patrick A. Stephens, P. B. Burch, Percy Anderson, Charles S. Sparkman, Frank Mullen. Ralph McDonough, Joseph E. Martin, and Clyde Pumphrey, were severally aiding, abetting and assisting said Merchants Stock & Grain Company in so doing. That when said Merchants Stock & Grain Company and said John F. Ryan, Francis J. Miner, Peter Holmes, Patrick A. Stephens, P. B. Burch, Percy Anderson, Charles S. Sparkman, Frank Mullen, Ralph McDonough, Joseph E. Martin, and Clyde Pumphrey, learned of the issuance against them of said injunction, as they severally did on the the date it was issued, said defendants did not cease to receive or use or distribute said quotations, as they should have done, but on the contrary have continued to receive and use said continuous quotations in the main and branch offices of said Merchants Stock & Grain Company in the City of St. Louis, State of Missouri, and other places, and to have, maintain and permit telegraph or other wires running into or through their said offices, and to distribute and send the said quotations over telegraph or other wires running into or through their said offices, and to distribute and send the said quotations over telegraph or other wires to and between said main and branch offices during every business day from the 6th day of November, 1909, down to the present time, between the hours of 9:30 A. M. and 1:15 P. M., and on Saturdays between the hours of 9:30 A. M. and 12:00 o'clock noon (which are the market hours of said Board of Trade of the City of Chicago and the time during which said quotations are made and distributed by said Board of Trade).

WHEREFORE, Board of Trade of the City of Chicago prays that the said Merchants Stock & Grain Company, John F. Ryan, Francis J. Miner, Peter Holmes, Patrick A. Stephens, P. B. Burch, Percy Anderson, Charles S. Sparkman, Frank Mullen, Ralph McDonough, Joseph E. Martin, and Clyde Pumphrey, may be required to answer this petition and show cause why they should not be punished for contempt for violation of said injunction, and failing to show such cause, that said defendants, and each of them, may be adjudged guilty of contempt and be punished accordingly.

BOARD OF TRADE OF THE CITY OF CHICAGO,
By HENRY S. ROBBINS,
MARTIN H. FOSS,
LEHMANN & LEHMANN,
Its Solicitors.

Dated, December 20, 1909.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS,
COUNTY OF COOK. } ss.

GEORGE F. STONE, being first duly sworn, deposes and says that he is Secretary of Board of Trade of the City of Chicago. That he has read the foregoing petition and knows the contents thereof, and that the same is true, as he verily believes.

GEORGE F. STONE.

Subscribed and sworn to before me this 21st day of December, 1909.

OSCAR E. FLINT,
Notary Public.

[SEAL]

[redacted]

IN THE

SUPREME COURT OF THE UNITED STATES

[redacted]

No. 10, Original.

[redacted]

IN THE MATTER OF

[redacted]

PETITION FOR MANDAMUS.

[redacted]

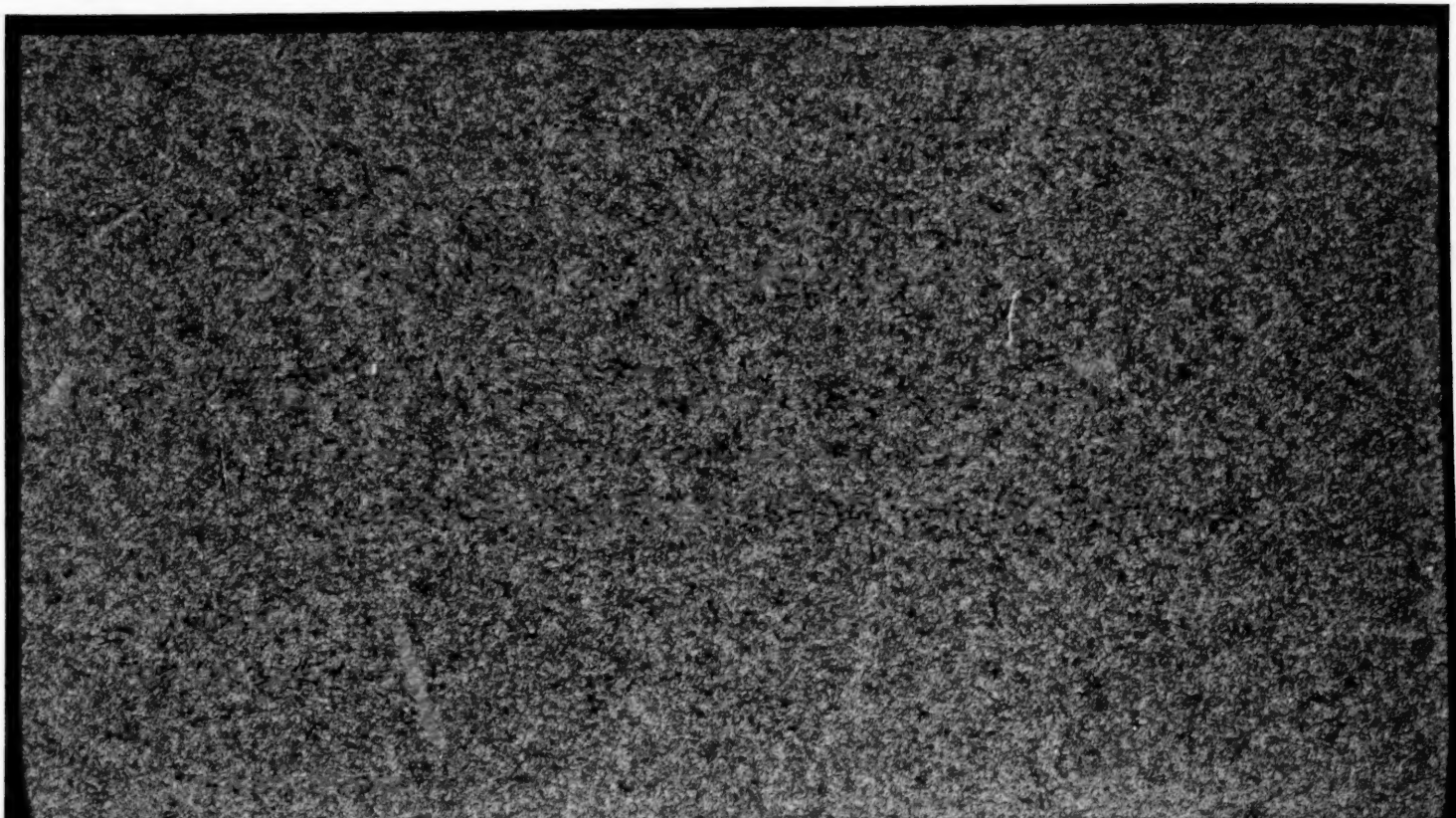
BRIEF IN OPPOSITION TO MOTION OF [redacted] FOR LEAVE

[redacted]

HENRY E. ROBBINS,

[redacted]

[redacted]



IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1911.

No. 10, Original.

IN THE MATTER OF MERCHANTS STOCK & GRAIN COMPANY, FRANK J. MINER AND PATRICK A. STEPHENS, *Petitioners.*	PETITION FOR MANDAMUS.

BRIEF IN OPPOSITION TO MOTION TO MAKE RULE ABSOLUTE.

The opinion of the Circuit Court of Appeals (set out in the return) clearly states the reasons which led the respondents to decline jursidiction. As they have no personal interest in the outcome of this application, this motion might well be submitted, so far as they are concerned, without any supporting brief.

The question, however, is an important one generally, and also to the Board of Trade of the City of Chicago (defendant in error in the Circuit Court of Appeals), which is the real party interested in resisting this application.

It seems, therefore, not inappropriate with the concurrence of the respondents to file, more on behalf of the Board of Trade than of respondents, a brief supplementing the return and enlarging upon the reasons why this motion should be denied.

The decision of this court in *Gompers* v. *Bucks S. & R. Co.*, 221 U. S. 418 (rendered after the respondents had dismissed the writ of error), seems a sufficient authority for the denial of this motion.

A comparison of that case with the case at bar will show that they are similar in the following respects:

Each was a bill for an injunction to protect the plaintiff's property right (the right to do business being property).

In each a temporary injunction was issued and was disobeyed.

In each the plaintiff in the injunction suit filed *in that suit* and entitled therein, a petition alleging a violation of the injunction and praying that the defendants enjoined be adjudged to be in contempt, and be punished therefor.

In each case this petition was signed by the attorney for the plaintiff in the original suit.

In each case an order to show cause was entered entitled in the original cause and requiring the defendants to show cause why they should not be punished for contempt.

In each case the defendants filed an answer to the rule to show cause, which answer was also entitled in the original cause.

In each case issues of fact were thus raised and evidence was taken before a special examiner in chancery, part of it in the Gompers case and all of it in the case at bar. (In the case at bar the examiner was appointed by special order entitled and entered in the original cause.)

In each case the court adjudged the respondents guilty of contempt.

In each case the defendants were adjudged to pay the costs of the proceeding, in the case at bar the costs being adjudged against the principal defendant only.

In each case the respondents' appeal papers were entitled and drawn as in an appeal or writ of error in the original injunction suit.

All of these elements were held in the *Gompers* case to be material in determining whether the contempt proceeding was civil or criminal.

The only material points of difference in the two cases, so far as the question at bar is concerned, are:

(1) In the *Gompers* case the petition in the contempt proceedings contained also a prayer "that petitioner may have such other and further relief as the nature of its case may require," and the petition in the case at bar has no such prayer.

(2) In the *Gompers* case—but not in the case at bar— the petition by reference made the record in the original cause a part of the contempt proceeding.

(3) In the *Gompers* case the plaintiff did, and in the case at bar the plaintiff did not, examine the defendants as witnesses.

(4) The punishment imposed in the *Gompers* case was imprisonment for stated periods, and in the case at bar was a fine of $3,500, three-quarters of which is payable to the plaintiff in the injunction suit and one-quarter to the United States.

This court having decided in the *Gompers* case that the proceeding was civil and not criminal, it would seem to follow that the present writ must be denied, unless one or more of the four particulars above specified differentiate the two cases and make the proceeding in the case at bar criminal.

That the first, second and third elements above mentioned (the general prayer for relief, reference in the petition to the original cause and the calling of the defendants as witnesses) are insufficient to do so, seems plain; for these were acts of plaintiff, and the first two were only, and the third mainly, important in evidencing the intention or purpose of the plaintiff to institute a remedial rather than a punitive or criminal proceeding. If such intention is to be the test (solely or in part) of the nature of the proceeding, then it must be apparent under the *Gompers* case that the question must be, not whether the same identical facts evidencing such purpose of the plaintiff are present in each case, but whether each record, when considered in its entirety, sufficiently discloses the purpose or intention of the plaintiff to have the proceeding civil.

When the case at bar is so considered, the entire record will be found to amply disclose that plaintiff's purpose was to institute a proceeding, whose

primary object was to secure compliance by defendants with the injunction. The Board of Trade (plaintiff) instituted the proceeding and carried through the trial court and the Circuit Court of Appeals the burden of conducting it. In every step taken by the Board of Trade it was treated as a civil proceeding. Every paper filed and every order entered at its instance was entitled in the original suit. When the respondents in the contempt proceeding (petitioners here) claimed that the proceeding was criminal, and sought on this ground to set aside the order of reference (see stipulation filed here), the Board of Trade resisted that application. It may, perhaps, be said also that the trial court, by denying that motion, here concurred in the attitude of the Board of Trade, that the proceeding should be regarded as civil rather than criminal. It may be here added that this purpose of the trial court was further evidenced in the form of the judgment it entered, which was in the main remedial and beneficial to the plaintiff. However that may be, it was plainly the intention and wish of the Board of Trade that the proceeding should be of a civil nature.

Thus the present proceeding, as respects the purpose or intention of the petitioner respecting it, was more clearly civil than was the *Gompers* case.

This is also true, so far as the judgment is to be regarded as determinative of the nature of the contempt; for punishment by imprisonment is much more criminal than a fine, to be followed by imprisonment only in case of nonpayment, especially where three-quarters of the fine goes to the plaintiff.

Thus the *Gompers* case is practically on all fours with the case at bar, and upon the authority of that case alone this writ should be denied.

This brief might stop here. As, however, the question is an important one, it does not seem improper to add a few suggestions to fortify the position that a contempt proceedings arising out of a non-compliance with an order (whether mandatory or prohibitory, interlocutory or final), when instituted and conducted by the party in whose favor the order is, should always be regarded as civil rather than criminal.

One easy classification of contempts—which rests upon the character of the act of contempt—places in one class affronts to the dignity and authority of courts, such as disturbances of the sessions of court, assaults or intimidation of judges or officers of court while in court or proceeding thereto, misconduct of attorneys, bribing or tampering with witnesses or jurors, interference with the custody of receivers, and other like acts, which are calculated to impede the orderly enforcement of the law. Many of such acts are committed by persons not parties to the suits in such court. This classification embraces all persons, regardless of whether they are parties to suits or not. Within this class seem to fall also acts by one *not* a party to a suit in resistance of an order of court.

Bessette v. *W. B. Conkey Co.*, 194 U. S. 324, 329.

O'Shea v. *O'Shea*, L. R. (1890), 15 P. D. 59.

Acts of this class are held criminal contempts be-

cause, like the commission of any crime, they primarily and principally affect the public at large rather than any particular individual thereof. Hence proceedings for their punishment usually originate with, or are prosecuted by appointees of, the court or a public prosecutor.

Another class comprises acts in disobedience of orders of court committed by parties to such orders. Such acts are clearly distinguishable from acts of the first class in that they are primarily prejudicial to the persons entitled to the benefit of such orders.

The first class may be dismissed from consideration as wholly foreign to the question at bar. This brief will be confined to the second class.

The elements which have been regarded by different courts as determinative of the character of contempt proceedings instituted against parties to suits for disobedience of orders or decrees entered therein are these:

(1) The nature, kind or purpose of the judgment entered therein.

(2) The intention of the parties thereto as disclosed by the form of the proceeding, its pleadings, etc.—how, in short, the parties have treated it.

(3) The dominating purpose or object of the proceeding.

First, as to the judgment. A careful investigation of the English cases fails to disclose any case where the character of the proceedings—whether civil or criminal—has been determined by the kind of puishment imposed by the judgment. Unconditional fines and imprisonments, from which compli-

ance with the order affords no escape, seems to be imposed in contempt proceedings which are held civil.

Seaward v. *Paterson,* L. R. 1 Ch. Div. (1897) 545.

In re Evans, L. R. 1, Ch. Div. (1893), at p. 267.

Much may be said in favor of this view. In some injunction suits fines measured in some degree by the pecuniary injury to plaintiff and his expenditures to establish the contempt will not be sufficiently coercive to secure for the plaintiff obedience to the injunction. The case at bar will illustrate this, if we may go outside of the record of this application and refer to *Board of Trade* v. *Christie,* 198 U. S. 236. The provable damage to the Board of Trade from the illegal use of its market quotations is not large, because the telegraph companies pay it a fixed sum per year for the privilege of distributing them. Its legal expenses in a contempt proceeding are, of course, limited. These two combined will often be less than the value to the bucket shop of the receipt of the quotations during the hearing of the contempt proceedings. In other words, a defendant enjoined may often find it more profitable to violate the injunction and pay a fine thus measured than to obey the injunction. There is, therefore, much in favor of the view that an unconditional imprisonment ought not in all cases to be regarded as an inappropriate judgment in a civil contempt proceeding.

This court having, however, held otherwise in the *Gompers* case, and that question not being here involved, we refrain from further discussing it.

As, however, in the *Gompers* case no such question as to fines arose—the punishment there being unconditional imprisonment—and whatever there said applicable to fines being merely *in arguendo*, it seems not improper to suggest to this court the view that an unconditional fine, in excess of what of it may properly be made payable to the plaintiff, ought not in all cases to be regarded as an inappropriate judgment in a civil contempt proceeding. The deterrent influence of the power to impose fines ought to be enough to secure obedience to injunctions, even though, to make it so, it shall be necessary to make part of the fine payable to the Government.

This court did decide in

> Matter of Christensen Eng'rg Co., 194 U. S. 459,

that in contempt proceedings resulting in an unconditional fine the direction of the fine determined the character of the proceeding. In that case *one-half* the fine was given to the United States and one-half to the plaintiffs, and this was held to make it a criminal contempt. If that case is not superseded by the later decision of this court in the *Gompers* case, then the question in this application is a simple one—whether the giving of three-quarters of the fine, instead of one-half, to the plaintiff in the injunction suit, and one-quarter to the United States, does not fix the character of the proceeding as civil.

As this court has said:

> "It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is reme-

> dial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court."

In a contempt proceeding instituted by the plaintiff in an injunction suit, its purpose, so far as such plaintiff is concerned, is clearly remedial and coercive. If it becomes anything more, it is merely because, when the matter is brought to the attention of the court, it decides that the act complained of is also an affront to the court's authority, and for that reason it imposes a fine payable in whole or in part to the Government. But when the trial court makes the part payable to the Government only one-fourth of the entire fine and gives the balance to the plaintiff, does it not by that act declare that in its judgment the main and principal purpose of the proceeding was remedial and coercive rather than punitive? Should not, then, under the *Christensen* case this proceeding be held a civil one and this motion be denied?

But has not the *Christensen* case been modified by the *Gompers* case? If the punishment imposed determines the character of the proceeding, then the Court of Appeals was clearly right in the *Gompers* case. For, if it is for the trial court to say whether the proceeding shall be civil or criminal, and an unconditional imprisonment is, as this court decided in the *Gompers* case, only appropriate to a criminal contempt, then Judge Wright manifested his purpose to fix the character of the proceeding as criminal by consigning Gompers and his associates to prison unconditionally.

As we construe the *Gompers* case, it rejects the principle that the punishment imposed by the judgment determines the character of the proceeding, and establishes—what seems to be the better doctrine—that the character of the proceeding must be otherwise determined, and that the judgment entered must fit the proceeding as thus established.

We say better doctrine, for if, as this court stated in the *Gompers* case, a criminal contempt is so far a criminal case as to require proof beyond a reasonable doubt and as to preclude the examination of respondent himself (neither of which would be true in a proceeding for civil contempt merely), then, by making the judgment the test, the anomaly is presented that during the hearing and up to the time of the judgment neither party can know the rules of procedure either as respects the quantum of proof necessary, or what witnesses may be examined. Such a condition is unknown to any other judicial proceeding and ought not to exist in a contempt case. In every other proceeding the law requires the judgment to fit the action. Why should it not in contempt?

Furthermore, the judgment will only furnish the test when it adjudges respondents guilty. A judgment dismissing the petition gives no indication whether the court regarded the contempt as civil or criminal.

Second. *The intention of the parties.* The first question here is, whether the intention of the plaintiff (petitioner), or that of the defendants (respondents) shall control. For it is idle to hope that they would often agree. That of respondents should not

prevail, because their aim will always be to defeat the petition altogether. Manifestly, then, if either party is to determine whether the proceeding should be civil or criminal, it should be the petitioner in the contempt proceeding. He alone is interested in its success.

But after all, is not the intention of the plaintiff (petitioner)—like the judgment finally entered in the proceeding—an unsatisfactory test, and should not the real test be—

Third. *The main purpose of the proceeding?* When a plaintiff obtains an injunction to prevent the doing of an act—not in itself criminal—and subsequently upon a violation of the injunction brings contempt proceedings, the sole purpose of such proceedings, so far as the plaintiff is concerned, is manifestly in almost every case to secure what shall be remedial and coercive—remedial as to the past and coercive as to the future. In no such case is the plaintiff actuated by the altruistic motive of vindicating the authority of the court.

But it is not, perhaps, the purpose of the plaintiff, but—so far as it is distinguishable from that—the purpose of the proceeding itself which should control. In most cases the main or dominating purpose of the proceeding always is to secure obedience to the injunction, and in order to secure that result, the court should be permitted to impose a fine large enough to "smart," even if, to do this, it is necessary to make part of the fine payable to the Government.

The most practical solution of the question under consideration would, therefore, seem to be, to make

the main or dominating purpose of the contempt proceeding the test of its character. This will make a contempt proceeding arising out of the violation of an injunction and instituted by the party in whose favor it is issued, civil rather than criminal, as in such proceeding the main or dominating purpose is always to obtain for the plaintiff the benefit of the injunction, except perhaps when a second disobedience of the same injunction may make the vindication of the court's authority the main object.

This seems to be the well established rule in England.

O'Shea v. *O'Shea*, L. R. (1890) 15 P. D. 59.
Oswald on Contempt of Court, 3rd Ed., 36, 230.

In the *O'Shea case*, COTTON, L. J., said (p. 62):

> "When a man does not obey an order of the court made in some civil proceeding, to do or to abstain from doing something—as where an injunction is granted in an action against a defendant, and he does not perform what he is ordered to perform, and then a motion is made to commit him for contempt—that is really only a procedure to get something done in the action, and has nothing of a criminal nature in it."

The same rule is expressed by Mr. Justice BREWER in delivering the opinion of this court in

Bessette v. *W. B. Conkey Co.*, 194 U. S. 324, 329,

as follows:

> "If in the progress of a suit a party is ordered by the court to abstain from some action which is injurious to the rights of the adverse party, and he disobeys that order, he may also

> be guilty of contempt, but the personal injury to the party in whose favor the court has made the order gives a remedial character to the contempt proceeding. The punishment is to secure to the adverse party the right which the court has awarded to him. He is the one primarily interested."

There are several reasons why this should be the test. In the first place, if a proceeding based upon a petition of a plaintiff who has secured an injunction is to be regarded as criminal, and if, as this court stated (although somewhat *obiter*) in the *Gompers* case, a violation of the injunction must be established beyond a reasonable doubt, then it will often happen that the courts will be put in the attitude of granting injunctions which they are powerless to enforce. For injunctions are often granted upon a mere preponderance of the evidence, and the infringement of the right by the defendant is not susceptible of proof beyond a reasonable doubt. In such cases the defendant may violate the injunction with impunity, if a proceeding based upon such violation is to be regarded as criminal rather than civil.

Take, for illustration—if we may go beyond the present record—the many injunctions which have issued under the decision in *Board of Trade* v. *Christie*, 198 U. S. 236, to protect the Chicago Board of Trade against the purloining of its market quotations. These quotations are distributed by wires running from Chicago to most of the cities in this country. A wrongdoer may by tapping any of these wires easily secure these quotations, and use them behind closed doors for the making of bucket shop

transactions in the manner disclosed in *Board of Trade* v. *Hammond Elevator Co.*, 198 U. S. 424.

This can usually be proven only by comparing the quotations transmitted from these closed offices over telegraph wires to points through the country where the trades are gathered with the records of the quotations kept in Chicago. That kind of evidence has, since the decision of this court in *Board of Trade* v. *Christie*, been held sufficient in many cases to secure the Board of Trade injunctions, but some courts might hesitate to regard it as proof beyond a reasonable doubt.

Another reason for holding a contempt proceeding brought by the plaintiff in an injunction suit and based on a violation thereof to be a civil proceeding, is well stated in the opinion set out in the return of the respondents (p. 14) as follows:

> "Any other practice in suits in equity would in effect render interlocutory injunctions and orders futile, would deprive courts of equity of their salutary power to protect parties from irreparable injury, to control the subject-matter and the parties, and to require the production of evidence *pendente lite*, and would produce intolerable delay in the prosecution of suits in equity. If, every time that a temporary injunction or an interlocutory order in an equity suit were made, parties to the suit might disobey it, submit to an order or judgment for contempt, and then by writ of error and supersedeas suspend that judgment until an appellate court could review it, the wrongs to prevent which such injunctions issue might be perpetrated before the hearings in the appellate court on the judgments for contempts could be had, and prosecutions of suits in equity might be indefinitely delayed, while parties awaited the decisions of

> appellate courts upon writs of error challenging the judgments for contempts for disobedience of interlocutory orders regarding the production of evidence and other matters relevant to the conduct of such suits. A practice of this nature should not be approved or permitted."

Thus tested, the contempt proceeding here was civil in its nature, a writ of error was not proper, and if making part of the fine made payable to the Government was wrong, this may be corrected only upon an appeal from the final decree in the injunction suit.

It is, therefore, respectfully urged that the motion to make the rule absolute should be denied.

HENRY S. ROBBINS,
Counsel for Respondents.